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**Issue date: 22Oct2001**

*In the matter of*
**Ralph D. Dye,**
Claimant

Case No. 2001-BLA-0381

v.

**Farwest Coal Company,**
Employer

and

**Director, Office of Workers' Compensation Programs,**
Party-in-Interest.

**APPEARANCES:**

On behalf of Claimant:
Joseph E. Wolfe, Esquire
Wolfe & Farmer
P.O. Box 625
Norton, VA 24273

On behalf of Employer:
Joseph W. Bowman, Esquire
Street, Street, Street, Scott & Bowman
P.O. Box 2100
Grundy, VA 24614

**BEFORE:**
Daniel F. Solomon
Administrative Law Judge

# DECISION AND ORDER AWARDING BENEFITS[1]

## Jurisdiction and Claim History

This case comes on a request for hearing filed by the Claimant, Ralph D. Dye, on June 12, 2000 pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §§901 *et seq.* (the Act.). Claimant originally filed a claim for Black Lung benefits on July 25, 1974 (DX 36-36). By Notice of Initial Finding dated April 21, 1981, Mining, Inc., the named responsible operator, was informed that the Claimant was initially entitled to benefits (Id.). On March 18, 1982, the Deputy Commissioner issued a Decision and Order dismissing Mining, Inc. pursuant to Section 205 of the 1981 Amendments to the Black Lung Act, and liability transferred to the

[1] 20 CFR § 725.477, 5 CFR § 554-7 (Administrative Procedure Act), and also 20 CFR § 725.479 Finality of decisions and orders.

Black Lung Benefits Trust Fund (Id.).

On June 10, 1982, the district director vacated and set aside the initial finding of Claimant's entitlement to benefits (Id.). Specifically, the district director found that, although the x-ray evidence was sufficient to invoke the interim presumption under § 727.203(a)(1), the presumption of total disability had been rebutted under § 727.203(b)(2) (Id.).

Claimant's first duplicate claim[2]/second application was filed February 3, 1994 (Id.), naming Far West Coal Company as the responsible operator. Thereafter, the district director issued an award for benefits on August 26, 1994, later affirmed on December 20, 1994 (DX 36-42). That decision was reversed by Administrative Law Judge James Guill's Decision and Order dated August 26, 1996 (Id.). In his Order, Judge Guill found that Claimant's evidence of total disability established a material change in conditions for purposes of his duplicate; however, the claim ultimately failed by virtue of Claimant's inability to show that pneumoconiosis was the cause of his total pulmonary or respiratory impairment (Id.).

On July 5, 2001, I issued an Order regarding the black lung regulations amended on December 20, 2000. The effective date is January 19, 2001. At that time the regulations were the subject of a preliminary injunction before the United States District Court, District of Columbia, ***National Mining Ass'n. v. Elaine L. Chao, Secretary of Labor***, Case No. 1:00CV03086. Both parties briefed the issue. The injunction was lifted by Order of the Honorable Emmet G. Sullivan, dated August 9, 200. This matter is now moot.

A hearing was held July 23, 2001 in Abingdon, Virginia. The Claimant was represented by Joseph E. Wolfe, Esquire, Wolfe, Farmer, Williams & Rutherford, located in Norton, Virginia. Far West Coal Company (hereinafter "Employer") was represented by Joseph W. Bowman, Esquire, Street, Street, Street, Scott & Bowman, located in Grundy, Virginia. At the hearing, thirty-eight (38) Director's Exhibits were entered into evidence.[3] The Claimant offered four (4) exhibits and the Employer offered two (2) exhibits. Testimony was received by the Claimant. Lastly, post-hearing briefs were submitted by the Claimant and Employer, which are admitted into evidence.

The Claimant was born April 17, 1934 and was sixty-eight (68) years of age at the time of the hearing (DX 36-36). On March 22, 1955, he married the former Evelyn Wallace, who was born August 10, 1935 (DX 35). They are currently still married and living together (DX 36-36).

Claimant testified that he began employment in the coal mine industry in 1955 when he was in his early twenties (Tr. 10). Though the actual number of years is somewhat uncertain, the parties stipulated that the Claimant worked for fourteen (14) years in coal mine employment (Tr. 32), all of which were spent underground (Tr. 11). Due to the nature of the coal industry at the time, Claimant worked for an abundant number of different mining companies throughout his mining career, which ended in 1980 (Tr. 11 - 14).

Claimant testified working for the Employer, Far West Coal Company from 1969 through

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[2] The claimant's prior claims are administratively final.

[3] References to "DX" are exhibits of the Director. Claimant's exhibits are marked "CX," whereas the Employer's are marked "EX."

1971 (Tr. 13). From there, Claimant testified that he was employed by Mining, Inc. from 1972 through 1974 (Tr. 13). Over the remaining four (4) to five (5) years as a coal miner, Claimant worked for various coal mining companies, none for longer than a year (Tr. 14).

Claimant contends that he has had progressive shortness of breath with exertion for more than ten (10) years. (CX 1). Claimant further states that he would be "plumb out of breath" after climbing a single flight of stairs. (Id.) Additionally, Claimant asserts that he has a chronic productive cough and wheezes with exertion and at night (Id.). Claimant states that he has tightness in this substernal area all the time and right anterolateral lower chest pain with exertion, but relieved by rest (Id.). Lastly, Claimant testified that "I can't do anything now" and would not be able to go back and do any type of work that he did before in the mines. (Tr. 15).

Employer contests the fact that it is not the proper responsible operator (Tr. 33 - 34). In fact, Employer asserts that Mining, Inc. or a subsequent employer is the correct responsible operator (Tr. 34). To the contrary, Claimant asserts that Employer is the proper responsible operator based on his contention that Far West Coal Company and Mining, Inc. were managed and owned by the same individuals (DX 36-35). According to the Claimant, the two companies' mines were located side-by-side and apparently Far West was cutting into Mine Inc.'s mine (Id.). As a result, Claimant asserts that the two mines were combined into one mine existing under the name of Mining, Inc. (Id.).

***Material Change in Condition***

Any time within one (1) year of a denial or award of benefits, any party to the proceeding may request a reconsideration based on a change in condition or a mistake of fact made during the determination of the claim. 20 C.F.R. §§ 725.310. However, after the expiration of one (1) year, the submission of additional material or another claim is considered a duplicate claim which will be denied on the basis of the prior denial unless the claimant demonstrates a material change in conditions under the provisions of 20 C.F.R. §§725.309 as interpreted by the Benefits Review Board and Federal Courts of Appeals. Under this regulatory provision and according to the Court of Appeals for the Sixth Circuit in ***Sharondale Corporation v. Ross***, 42 F.3d 993, 997-998 (6th Circuit 1994):

> [T]o assess whether a material change is established, the ALJ must consider all of the new evidence, favorable and unfavorable, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him. If the miner establishes the existence of that element, he has demonstrated, as a matter of law, a material change. Then, the ALJ must consider whether all of the record evidence, including that submitted with the previous claims, supports a finding of entitlement to benefits.

I interpret the *Sharondale* approach to mean that the relevant inquiry in a material change case is whether evidence developed since the prior adjudication would now support a finding of an element of entitlement. The court in ***Peabody Coal Company v. Spese,*** 117 F.3d 1001, 1008 (7th Cir. 1997) put the concept in clearer terms:

The key point is that the claimant cannot simply bring in new evidence that

> addresses his condition at the time of the earlier denial. His theory of recovery on the new claim must be consistent with the assumption that the original denial was correct. To prevail on the new claim, therefore, the miner must show that something capable of making a difference has changed since the record closed on the first application.

On August 26, 1996, Judge Guill denied Mr. Dye's claim because he did not establish that his pneumoconiosis was the cause of his total pulmonary or respiratory impairment (DX 36-42). As a result, to demonstrate that a material change in condition has occurred since the denial of his prior claim, Claimant must prove, based on evidence developed since August, 1996, that his total disability was caused by coal workers' pneumoconiosis.

Based my foregoing conclusion that Claimant has proved that his total disability was due to coal workers' pneumoconiosis, I find that Claimant has established that a material change in his condition has occurred since his last application of benefits had been denied.

**Burden of Proof**

"Burden of proof," as used in the this setting and under the Administrative Procedure Act[4] is that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof". "Burden of proof" means burden of persuasion, not merely burden of production. 5 U.S.C.A. § 556(d)[5]. The drafters of the APA used the term "burden of proof" to mean the burden of persuasion. ***Director, OWCP, Department of Labor v. Greenwich Collieries*** [Ondecko], 512 U.S. 267, 114 S.Ct. 2251 (1994).[6]

The Claimant bears the burden of establishing the following elements by a preponderance of the evidence: (1) the miner suffers from pneumoconiosis; (2) the pneumoconiosis arose out of coal mine employment; (3) the miner is totally disabled; and (4) the miner's total disability is caused by pneumoconiosis. ***Gee v. W.G. Moore and Sons***, 9 B.L.R. 1-4 (1986)(*en banc)*; ***Baumgartner v. Director, OWCP***, 9 B.L.R. 1-65 (1986)(*en banc)*.

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[4]33 U.S.C. § 919(d) ("[N]otwithstanding any other provisions of this chapter, any hearing held under this chapter shall be conducted in accordance with [the APA]"); 5 U.S.C. § 554(c)(2). Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §§ 901-950, is incorporated by reference into Part C of the Black Lung Act pursuant to 30 U.S.C. §§ 932(a).

[5] The Tenth and Eleventh Circuits held that the burden of persuasion is greater than the burden of production, ***Alabama By-Products Corp. v. Killingsworth***, 733 F.2d 1511, 6 BLR 2-59 (11th Cir. 1984); ***Kaiser Steel Corp. v. Director, OWCP*** [*Sainz*], 748 F.2d 1426, 7 BLR 2-84 (10th Cir. 1984). These cases arose in the context where an interim presumption is triggered, and the burden of proof shifted from a claimant to an employer/carrier.

[6] Also known as the risk of nonpersuasion, see 9 J. Wigmore, ***Evidence*** § 2486 (J. Chadbourn rev.1981).

A Claimant has the general burden of establishing entitlement *and* the initial burden of going forward with the evidence. The obligation is to persuade the trier of fact of the truth of a proposition, not simply the burden of production, the obligation to come forward with evidence to support a claim.[7] Therefore, the claimant cannot rely on the Director to gather evidence.[8] A claimant, bears the risk of non-persuasion if the evidence is found insufficient to establish a crucial element. ***Oggero v. Director, OWCP***, 7 BLR 1-860 (1985). Evidence which is in equipoise is insufficient to sustain claimant's burden in this regard. ***Director, OWCP v. Greenwhich Colleries, et al.,*** 114 S. Ct. 2251 (1994), *aff'd sub nom.* ***Greenwhich Collieries v. Director, OWCP,*** 990 F.2d 730 (3rd Cir. 1993). Failure to establish any one of these elements will result in a denial of benefits. ***Hall v. Director, OWCP,*** 2 B.L.R. 1-998 (1980).

**Issues Presented**

The following issues are listed as contested by the Employer:[9] (1) whether the claim was timely filed; (2) whether the medical evidence establishes that the Miner suffered from pneumoconiosis pursuant to 20 C.F.R. § 718.202(a); (3) whether Claimant's pneumoconiosis arose, at least in part, out of coal mine employment; (4) whether the Claimant is totally disabled; (5) whether Claimant's disability is caused by pneumoconiosis pursuant to §§718.204; (6) whether the named Employer is the Responsible Operator; and (7) whether a material change in condition has occurred.

The Employer did not contest that Evelyn Wallace Dye is the dependent wife of the Claimant.

**Stipulations**

The parties agree that Claimant falls within the statutory definition of "miner" pursuant to 20 C.F.R. § 725.202 (Tr. 31), that he worked as a miner after December 31, 1969 (Tr. 31) and Claimant worked for fourteen (14) years in coal mine employment (Tr. 32). However, the parties do not agree that the medical evidence shows that the Claimant is totally disabled, total disability is produced by pneumoconiosis, stems from coal mine employment, or whether it was caused by pneumoconiosis.

***Responsible Operator***

Under the Regulations, liability for benefits under the Act is assessed against the most recent coal mine operator which meets the requirements set out in 20 C.F.R. §§ 725.491-3. As a result, the Administrative Law Judge will start with the most recent employer and work backwards in time until it finds the first operator that meets the regulatory requirements and has the ability to pay. ***Walker v. McNally Pittsburgh Manufacturing Corp. & Director, OWCP,*** 97-B.L.A.-236 (2000); see ***Cole v. East Kentucky Colleries,*** 20 B.L.R. 1-51 (1996) and ***Director, OWCP v. Trace Fork Coal Co.*****[Matney],** 67 F.3d 503 (4th Cir. 1995), rev'd in part sub nom., ***Matney v. Trace Fork Coal***

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[7] ***Id***, *also see* ***White v. Director, OWCP***, 6 BLR 1-368 (1983)

[8] ***Id***.

[9] See the CM-1025.

***Co.,*** 17 B.L.R. 1-145 (1993).

Section 725.491(a) defines an operator as "any owner ... who operates, controls or supervises a coal mine or any independent contractor performing services or construction such mine....[c]ertain other employees, including those engaged in coal mine construction...shall also be considered operators for the purposes of this part." A relevant criteria for the designation of a responsible operator is the length of employment. ***Walker v. McNally Pittsburgh Manufacturing Corp. & Director, OWCP,*** 97-B.L.A.-236 (2000). According to 20 C.F.R. § 725.493(a)(1), the necessary length of employment is a cumulative period of more than one (1) year.

Far West challenges its designation as responsible operator because it contends that Claimant was subsequently employed for at least one (1) year by another operator, Russ Coal, in 1979 and 1980. On cross-examination, Claimant testified that he did in fact work as a foreman for William H. Russ Coal Company in 1979 and 1980 (Tr. 21-22).[10] However, evidence of record shows that Claimant only worked as a foreman for William H. Russ Coal Company for a period of nine (9) months [October, 1979 through June, 1980] (DX 36-24B). Therefore, Claimant did not work for a subsequent employer for a cumulative period of more than one (1) year as required by 20 C.F.R. § 725.493(a)(1).

I find the Claimant's testimony, as to whom he worked for and when, as credible. Therefore, under these regulations, Far West Coal Company is the responsible operator because it was engaged in coal mine construction when it employed Mr. Dye, and it was the most recent operator to employ Mr. Dye for more than one (1) year. Finally, Far West has the ability to pay if it is determined that benefits should be awarded.

**Medical Evidence**

The following is a summary of the evidence of record:

| | | | ***X-Ray Interpretations*** | |
|---|---|---|---|---|
| | ***Exhibit No.*** | ***Date of X-Ray*** | ***Physician and Qualifications[11]*** | ***Diagnosis/History Noted Comments*** |
| 1. | CX-3 | 5-21-01 | Patel, BR, BCR | Positive, 2/2 t, t A |
| 2. | CX-2 | 5-21-01 | Cappiello, BR, BCR | Positive, 2/2 s, p; underlying chronic obstructive pulmonary disease (em) noted |
| 3. | CX-4 | 5-21-01 | Ahmed, BR, BCR | Positive, 1/2 p, q; changes of chronic obstructive pulmonary disease noted |
| 4. | DX-28 | 9-6-00 | Fino, BR | Negative |
| 5. | DX-30 | 9-6-00 | Templeton, BR, BCR | Positive, 2/1, t, p; progressive interstitial lung disease with emphysema and |

[10] Claimant also testified that he earned approximately $6,000 in 1979 and nearly $11,000 in 1980 while working for William H. Russ Coal Company.

[11] The abbreviations above are used to designate physician's qualifications:
"B" for "B-reader" "BC" for "Board-certified Radiologist" "BE" for "Board-eligible Radiologist".

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|---|---|---|---|---|
| | | | | bronchiectasis noted |
| 6. | DX-33 | 9-6-00 | Scott, BR, BCR | Negative; minimal scarring compatible with healed tuberculosis noted |
| 7. | DX-33 | 9-6-00 | Wheeler, BR, BCR | Negative; nodules or scars compatible with tuberculosis |
| 8. | DX-10 | 8-30-00 | Navani, BR, BCR | Positive, 1/1, q, t; film quality 3, with right base of x-ray clipped |
| 9. | DX-9,11 | 8-30-00 | Patel, BR, BCR | Positive, 2/2, t, t; film quality 2 with bilateral scapular overlap |
| 10. | CX-2 | 2-7-00 | Cappiello, BR, BCR | Positive, 2/2, s, t; changes of chronic obstructive pulmonary disease (em) noted |
| 11. | CX-1 | 2-7-00 | Aycoth, BR, BCR | Positive, 2/2, q, t |

## *Pulmonary Function Tests*

| | ***Exhibit No.*** | ***Test Date*** | ***Physician*** | ***FEV 1*** | | ***FVC*** | ***MVV*** | ***TR*** | ***Age/Ht.*** | ***Coop./ Comp.*** |
|---|---|---|---|---|---|---|---|---|---|---|
| 1. | CX-3 | 5-21-01 | Rasmussen | 2.11 | 4.77 | 53 | Y | 67/68" | | Good |
| | Post-Bronchodilator | | | 2.26 | 5.05 | 57 | | | | |
| 2. | DX-28 | 9-6-00 | Fino | 2.05 | 4.72 | 71 | Y | 66/68.5" | | Good |
| | Post-Bronchodilator | | | 2.34 | 4.97 | 91 | | | | |
| 3. | DX-5 | 8-30-00 | Rasmussen | 2.11 | 4.67 | 52 | Y | 66/69" | | Good |
| | Post-Bronchodilator | | | 2.40 | 5.68 | 63 | | | | |

## *Blood Gas Tests*

| | ***Exhibit No.*** | ***Test Date*** | ***Physician*** | ***PO2*** | ***PC02*** |
|---|---|---|---|---|---|
| 1. | CX-3 | 5-21-01 | Rasmussen | 65.0/67.0 | 35.0 |
| | Exercise if Administered: | | | 53.0 | 32.0 |
| | Predicted Normal Range: | | | ----- | ----- |
| 2. | DX-28 | 9-6-00 | Fino | 67.4 | 34.9 |
| | Exercise if Administered: | | | ----- | ----- |
| | Predicted Normal Range: | | | ----- | ----- |
| 3. | DX-7 | 1-30-97 | Rasmussen | 65.0 | 34.0 |
| | Exercise if Administered: | | | 53.0 | 34.0 |
| | Predicted Normal Range: | | | 70-98 | 37-44 |

## *Relevant Examination and Medical Reports*

| | ***Exhibit No.*** | ***Physician and Qualifications*** | ***Exam Date*** |
|---|---|---|---|
| 1. | DX 6 | Dr. Rasmussen<br>B Reader; Board Certified in Internal Medicine | 8-30-00 |

Comments: Dr. Rasmussen's medical report is based on his physical examination of Claimant as well as his review of Claimant's chest x-ray performed by Dr. Patel, which Dr. Rasmussen noted as showing a positive showing of pneumoconiosis. Dr. Rasmussen reported that Claimant was employed for nearly 21 years in coal mines and smoked 1/3 a pack of cigarettes a day for nearly thirty years. Claimant complained of experiencing shortness of breath with exertion approximately 10 - 15 years ago and having a chronic,

minimally productive cough. Claimant's ventilatory function studies show that Claimant has a marked loss of lung function as reflected by the reduced diffusing capacity and the marked impairment in oxygen transfer and hypoxia during exercise. Such a degree of impairment renders Claimant totally disabled for resuming his last regular coal mine job or for any other significant gainful employment. Claimant has two primary risk factors: cigarette smoke and coal mine exposure, with the latter being more significant because Claimant's gas exchange impairment significantly exceeds his ventilatory impairment. Etiology: it is medically reasonable to conclude that Claimant has CWP which arose from his coal mine employment.

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| 2. | DX 28 | Fino<br>B Reader; Board Certified in Internal Medicine and Pulmonary Disease | 9-6-00 |

Comments: Dr. Fino's medical report and opinions are based on his Sept. 6, 2000 examination of the Claimant, as well as his review of two chest x-rays (3/7/95 and 4/7/95) and a CT scan of the Claimant. Claimant smoked 1/3 pack of cigarettes a day for 30 years from 1950 until 1980. Claimant has normal lung volumes and diffusing capacity, but an abnormal pulmonary system. From a respiratory standpoint, Claimant does not retain the physiologic capacity to perform all the requirements of his last job. Examination of the Claimant revealed insufficient evidence to justify a diagnosis of simple CWP and therefore Claimant does not suffer from an occupationally acquired pulmonary condition. Risk Factors: coal mine dust exposure, diffuse pulmonary fibrosis and smoking. Diagnosis: diffuse interstitial pulmonary fibrosis, chronic obstructive lung disease consistent with smoking and a mass in his right upper lung zone, worrisome for malignancy. Etiology: Claimant's disabling respiratory impairment due to smoking and diffuse pulmonary fibrosis.

| | | | |
|---|---|---|---|
| 3. | DX 30 | Templeton<br>B Reader; Board Certified Radiologist | 11-16-00 |

Comments: In forming his medical opinion, Dr. Templeton reviewed three sets of Claimant's chest x-rays (3/7/95, 4/7/95 and 9/6/00) and the CT scan from Sept. 6, 2000. Diagnosis: progressive interstitial lung disease with emphysema and bronchiectais. Etiology: findings are not at all typical or suggestive of CWP or silicosis.

| | | | |
|---|---|---|---|
| 4. | DX 33 | Wheeler<br>B Reader; Board Certified Radiologist | 12-1-00 |

Comments: Dr. Wheeler's medical report is based on his review of Claimant's Sept. 6, 2000 CT scan. Scattered nodules in the mid-lung, the left upper lung and the anterolateral periphery. Minimally healed tuberculosis with small calcified granulomata in the lower right apex, the anterior portion of the left lower lung and the right hilum. Linear scarring in the right upper lung, lower right apex. Diagnosis: no pneumoconiosis, minimal tuberculosis in the right upper lung, probably healed from calcified granulomata and minimal to moderate centrilobular emphysema with small scattered blebs.

| | | | |
|---|---|---|---|
| 5. | DX 33 | Scott<br>B Reader; Board Certified Radiologist | 12-5-00 |

Comments: Dr. Scott's medical report is based on his review of the Sept. 6, 2000 CT Scan of Claimant's chest. Claimant has scarring in both mid-upper lungs (right more than left), compatible to healed tuberculosis. However, activity and cancer cannot be excluded. Diagnosis: moderate bullous emphysema present, with no evidence of CWP or silicosis.

| | | | |
|---|---|---|---|
| 6. | CX 3 | Rasmussen | 5-21-01 |

B Reader; Board Certified in Internal Medicine

Comments: Claimant began smoking about 1/3 pack of cigarettes daily at age twenty-one until he quit in 1980. At different intervals in his career, Claimant worked in a machine shop, exposing himself to machining oils. Claimant's chest x-ray indicated pneumoconiosis, minimal, irreversible obstructive ventilatory impairment and very severe pulmonary insufficiency as reflected primarily by the impairment in oxygen transfer. Based on such impairment, Claimant is totally disabled for any significant gainful employment and his last coal mine job. In view of the pattern of significantly greater gas exchange impairment than ventilatory impairment, coal mine dust exposure is the principal risk factor.

| | | | |
|---|---|---|---|
| 7. | EX 1 | Tuteur<br>Board Certified in Internal Medicine<br>and Pulmonary Disease | 6-28-01 |

Comments: In forming his medical opinion, Dr. Tuteur reviewed the medical reports of Drs. Rasmussen (8-30-00) and Fino, as well as Drs. Templeton, Wheeler and Scott's CT scan reports. No material change in condition since 1995. Claimant has a respiratory impairment, which waxes and wanes, and an impairment of gas exchange which develops during exercise. Diagnosis: radiographic changes potentially consistent with CWP, cigarette smoke induced chronic obstructive pulmonary disease and centilobular and bullous emphysema. Etiology: None of Claimant's respiratory or pulmonary impairment is due in whole or in part to CWP or coal mine dust exposure. The cause of his expiratory impairment is cigarette smoke induced chronic obstructive pulmonary disease with predominant emphysema.

## Discussion

### *Timely Filing*

Under C.F.R. § 725.308, a claim for black lung benefits must be filed within three (3) years after a medical determination of total disability due to pneumoconiosis which has been communicated to the miner or a person responsible for the care of the miner. Moreover, the Board has held that the statute of limitations applies only to the first claim filed, ***Andryka v. Rochester & Pittsburgh Coal Co.,*** 14 B.L.R. 1-34 (1990), and is presumed that a claim is timely filed unless the party opposing entitlement demonstrates it is untimely and there are no "extraordinary circumstances" under which the limitation period should be tolled, ***Daugherty v. Johns Creek Elkhorn Coal Corp.,*** 18 B.L.R. 1-95 (1994).

Herein, Claimant's June 12, 2000 application for benefits is a duplicate claim[12], and as such, he is presumed to have timely filed his claim. Furthermore, Employer has failed to set forth any evidence amounting to "extraordinary circumstances" which would cause the limitation period to be tolled. Therefore, I find that Claimant has timely filed his application for benefits.

### *Existence of Pneumoconiosis and its Etiology*

**1. Existence of Pneumoconiosis**

Pneumoconiosis is defined by the Regulations as "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." 20

[12] Claimant filed an initial claim on July 25, 1974, which was denied by the district director on June 10, 1982 because Claimant was not found to be totally disabled.

C.F.R. § 718.201. The definition is not confined to 'coal workers' pneumoconiosis,' but also includes other diseases arising out of coal mine employment, such as anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, progressive massive fibrosis, silicosis, or silicotuberculosis. 20 C.F.R. § 718.201.

This broad definition "effectively allows for the compensation of miners suffering from a variety of respiratory problems that may bear a relationship to their employment in the coal mines." ***Robinson v. Pickands Mather & Co./Leslie Coal Co. & Director, OWCP,*** 14 B.L.R. 2-68, 2-78 (CA4 1990), 914 4th Cir. 1990), citing ***Rose v. Clinchfield Coal Co.,*** 614 F.2d 936, 938 (4th Cir. 1980). Thus, asthma, asthmatic bronchitis or emphysema may fall under the regulatory definition of pneumoconiosis if they are related to coal dust exposure. ***Robinson v. Director, OWCP,*** 3 B.L.R. 1-798.7 (1981); ***Tokarcik v. Consolidation Coal Co.,*** 6 B.L.R. 1-666 (1983)(chronic bronchitis secondary to coal dust exposure equivalent to CWP); ***Heavilin v. Consolidation Coal Co.,*** 6 B.L.R. 1-1209 (B.R.B. 1984)(emphysema held compensable under the Act). Likewise, chronic obstructive pulmonary disease (COPD) may be encompassed within the legal definition of pneumoconiosis. ***Warth v. Southern Ohio Coal Co.,*** 60 F.3d 173 (4th Cir. 1995)(COPD refers to three disease processes - chronic bronchitis, emphysema and asthma - that are all characterized by airway dysfunction).

The claimant has the burden of proving the existence of pneumoconiosis. The Regulations provide the means of establishing the existence of pneumoconiosis by one of the following methods: (1) chest x-ray evidence; (2) autopsy or biopsy; (3) by operation of presumption; or (4) by "other relevant evidence." 20 C.F.R. §§ 410.414(a)-(c).

**a. X-Ray Evidence**

Section 718.202(a)(1) provides for a finding of the existence of pneumoconiosis with positive chest x-ray evidence, and that "where two or more x-rays are in conflict, in evaluating such x-ray reports, consideration shall be given to the radiographic qualifications of the physicians interpreting such x-rays." 20 C.F.R. § 718.202(a)(1). Positive x-rays may form the basis of a finding of the existence of pneumoconiosis; however, they must be considered in light of all the relevant evidence. I am not to blindly defer to the numerical superiority of x-ray evidence, ***Adkins v. Director, OWCP,*** 958 F.2d 49, 52 (4th Cir. 1992); ***Woodward v. Director, OWCP,*** 991 F.2d 314 (6th Cir. 1993); ***Sahara Coal Co. v. Fitts,*** 39 F.3d 781 (7th Cir. 1994); ***Wilt v. Wolverine Mining Co.,*** 14 B.L.R. 1-70 (1990), although it is within my discretion to do so. ***Edminston v. F & R Coal Co.,*** 14 B.L.R. 1-65 (1990).

Box 2B(c) of the standard x-ray form indicates the quantity of opacities in the lung and therefore, the presence or absence of pneumoconiosis. The more opacities noted in the lung, the more advanced the disease; and there are four (4) categories to which a physician may choose:

**0** = small opacities absent or less than in category 1;
**1** = small opacities definitely present, but few in number;
**2** = small opacities numerous, but normal lung markings still visible;
**3** = small opacities very numerous and normal lung markings are usually

partly or totally obscured.[13]

If no categories are chosen, then the x-ray report is not classified according to the standards adopted by the regulations and cannot, therefore, support a finding of pneumoconiosis. Likewise, an x-ray which is interpreted as Category 0 (–/0, 0/0, or 0/1) demonstrates, at most, only a negligible presence of the disease and will not support a finding of pneumoconiosis under the Act or regulations. 20 C.F.R. § 410.428(c).

If the physician determines that the study is Category 1 (1/0, 1/1 or 1/2), Category 2 (2/1, 2/2 or 2/3) or Category 3 (3/2, 3/3 or 3/+), then there is a definite presence of opacities in the lung and the x-ray report may be used as evidence of pneumoconiosis. An interpretation of 1/0 is the minimum reading under the regulations which will support a finding of pneumoconiosis. A 1/0 reading indicates that the physician has determined that the x-ray is Category 1, but he/she seriously considered Category 0. As for another example, a reading of 2/2 indicates that the physician determined that the x-ray was Category 2 and Category 2 was the only other category seriously considered by the physician.

In this case, the record contains eleven (11) interpretations of four (4) x-rays. The first x-ray submitted since Claimant's prior denial is dated February 7, 2000 and was read by Drs. Aycoth and Cappiello. Dr. Cappiello, a "B" reader and a Board Certified Radiologist,[14] interpreted the x-ray as positive for pneumoconiosis with a finding of 2/2 (CX 2). Dr. Aycoth also interpreted the x-ray as positive (2/2) (CX 1); however, his qualifications have not been admitted into evidence. Nonetheless, I find this x-ray to be positive, as it was read by a physician (Dr. Cappiello) with expert qualifications.

The Claimant's second chest x-ray was performed on August 30, 2000 and was read by Drs. Patel and Navani, both of whom are "B" readers and Board Certified Radiologists.[15] As with the previous x-ray, both Drs. Patel and Navani found this x-ray to be positive, 2/2 and 1/1 respectively (DX 9, 10, and 11). As such, I find this x-ray to be positive, as it was read by physicians with expert qualifications.

A third x-ray was taken on September 6, 2000 and interpreted by Drs. Fino, Templeton, Scott and Wheeler (DX 28, 30, and 33). All four (4) physicians are "B" readers and with the exception of Dr. Fino, each is a Board Certified Radiologist.[16] Drs. Fino, Scott and Wheeler all read the x-ray as negative (DX 28 and 33). However, Dr. Templeton interpreted the September 6, 2000 x-ray as positive with a finding of 2/1 (DX 30). I give less weight to Dr. Fino's interpretation since he is not a

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[13] 20 C.F.R. §§ 718.108 Chest Roentgenograms (x-rays).

[14] See Curriculum Vitae attached to exhibit CX 2.

[15] See Curriculum Vitae attached to the following exhibits: DX 9, 11 (Dr. Patel) and DX 10 (Dr. Navani).

[16] See Curriculum Vitae attached to the following exhibits: DX 28 (Dr. Fino); DX 30 (Dr. Templeton) and DX 33 (Drs. Scott and Wheeler).

Board Certified Radiologist, as are the others; and while Dr. Templeton has expert qualifications, his diagnosis of this x-ray makes note of possible emphysema and bronchiectasis and is unsupported by another physician of record. I give more weight to the multiple negative readings by Drs. Wheeler and Scott which support one another. Therefore, I find this x-ray to be negative.

The Claimant's last chest x-ray was performed on May 21, 2001 and read by Drs. Patel, Cappiello and Ahmed (CX 2, 3 and 4). Each physician is a "B"reader and a Board Certified Radiologist.[17] Additionally, Drs. Patel, Cappiello and Ahmed all made positive readings at 2/2 A, 2/2 and 1/2 respectively (CX 2, 3 and 4). As a result, I find this x-ray to be positive, as it was read by physicians with expert qualifications.

Another factor in determining whether a finding of pneumoconiosis exists upon an x-ray evidence is the date of the x-ray. In weighing x-rays based upon the "later evidence" rule, it is the date of the study, and not the date of the interpretation, which is relevant. ***Wheatley v. Peabody Coal Co.,*** 6 B.L.R. 1-1214 (1984). It is proper to accord greater weight to the most recent x-ray study of record. ***Stanford v. Director, OWCP,*** 7 B.L.R. 1-541 (1984); ***Tokarcik v. Consolidation Coal Co.,*** 6 B.L.R. 1-166 (1983). However, even if the most recent x-ray is positive, the judge is not required to accord it greater weight. Rather, the length of time between the x-rays studies and the qualifications of the interpreting physicians are factors to be considered. ***McMath v. Director, OWCP,*** 12 B.L.R. 1-6 (1988); **Pruitt v. Director, OWCP,** 7 B.L.R. 1-544; ***Gleza v. Ohio Mining Co.,*** 2 B.L.R. 1-436 (1979). The Board has indicated that a seven (7) month time period between x-ray studies is sufficient to apply the "later evidence" rule, but that five (5) and one-half months is too short a time period. ***Tokarcik,*** *supra*; ***Stanley v. Director, OWCP,*** 7 B.L.R. 1-386 (1984).

As stated above, the Claimant's last chest x-ray took place on May 5, 2001 in which Drs. Patel, Cappiello and Ahmed each interpreted the x-ray as positive for coal miners' pneumoconiosis. Before that, the Claimant's most recent chest x-ray was taken on September 6, 2001, nearly eight (8) months prior to the May 5th x-ray. As such, the "later evidence" rule is not applicable in this situation and therefore, the greatest weight need not be given to the May 5, 2001 x-ray.

Of the four (4) x-rays submitted, I have found three (3) to be positive and one (1) to be negative.[18] I give more weight to the three (3) positive findings because there are multiple positive readings by physicians with special radiographical qualifications. I give less weight to the single negative reading because of the differing interpretations between the physicians who read the September 6, 2000 x-ray. In ***Adkins v. Director, Owcp,*** 958 F.2d 49, 52 (4th Cir. 1992), the court exhibited disfavor in "counting heads." I do not give any special weight to "numerosity," but I note that there is a

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[17] See Curriculum Vitae attached to the following exhibits: CX 2 (Dr. Cappiello); CX 3 (Dr. Patel) and CX 4 (Dr. Ahmed).

[18] The most profuse finding was 2/2, established by Dr's. Patel (5-21-00 and 8-30-00), Cappiello (5-21-01 and 2-7-00) and Aycoth (2-7-00) (CX 1, 2 and 3). Dr. Templeton, who eventually concluded that Claimant did not have coal miners' pneumoconiosis, made a reading of 2/1 (DX 30). Dr's. Navani and Ahmed each made of finding of 1/1 and 1/2 respectively (DX 10 and CX 4). Only Dr. Patel made a finding of complicated pneumoconiosis (CX 3).

disparity and I attribute significant weight to the fact that Dr. Templeton made a finding of pneumoconiosis (2/1) in the September 6, 2000 x-ray (DX-30), whereas Drs. Fino, Scott and Wheeler all failed to diagnose pneumoconiosis (DX-28, DX-33).

Under 20 C.F.R. § 718.304, there is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis, if such miner is suffering from complicated pneumoconiosis. Complicated pneumoconiosis is established by x-rays classified as Category A, B or C, or by an autopsy or biopsy which yields massive lesions in the lung. The determination of whether the miner has complicated pneumoconiosis is a finding of fact, and the Judge must consider and weigh all relevant evidence. ***Melnick v. Consolidation Coal Co.,*** 16 B.L.R. 1-31 (1991); ***Maypray v. Island Creek Coal Co.,*** 7 B.L.R. 1-683 (1985).

**b. Autopsy or Biopsy Evidence**

As there is no autopsy or biopsy evidence in the record, Section 718.202(a)(2) is not applicable.

**c. Presumptions**

Section 718.202(a)(3) provides that it shall be presumed that the miner is suffering from pneumoconiosis if the presumptions in §§ 718.304, 718.305 or 718.306 are applicable. Section 718.304 provides for an irrebuttable presumption that the miner is totally disabled due to pneumoconiosis if x-ray, autopsy, biopsy or other evidence reveals complicated pneumoconiosis

Dr. Patel's May 21, 2001 x-ray interpretation (2/2, A) diagnosed the Claimant as having complicated pneumoconiosis. However, it is supported only by his own interpretation. None of the other three (3) x-rays, nor the ten (10) interpretations thereof conclude in a finding of complicated pneumoconiosis. Therefore, the preponderance of the evidence establishes simple, but not complicated pneumoconiosis. A claimant cannot prove the presence of complicated pneumoconiosis by simply submitting "some evidence" of the condition; complicated pneumoconiosis must be proved by a preponderance of the evidence. 20 C.F.R. § 718.403; ***Mayspray v. Island Creek Coal Co.,*** 7 B.L.R. 1-683 (1985), citing ***Truitt v. North American Coal Corp.,*** 626 F.2d 1137 (3rd Cir. 1980); ***Lane v. Union Carbide Corp.,*** 105 F.3d 166 (4th Cir. 1977).

Section 718.305 provides for a rebuttable presumption of totally disabling pneumoconiosis or death due to pneumoconiosis. However, since this claim was filed after January 1, 1982, the effective date of the 1982 Amendments, this section is no longer applicable to this case.

Section 718.306 provides for a presumption of entitlement in the case of a miner who dies on or before March 1, 1978 and who was employed in one or more coal mines for at least 25 years prior to June 30, 1971. This presumption is not applicable because this case involves a living miner.

**d. Other Relevant Evidence**

A determination of the existence of pneumoconiosis can be made if a physician, exercising sound medical judgment, based upon certain clinical data, medical and work histories and supported by a reasoned medical opinion, finds the miner suffers or suffered from pneumoconiosis, as defined in §

718.201, notwithstanding a negative.[19] 20 C.F.R. § 718.202(a)(4); ***Compton v. Beth Energy Mines, Inc. and Director, OWCP,*** 98-B.L.A.-14 (1998).

In this case, there are reports from three (3) physicians, two (2) of whom examined the Claimant, and one (1) who reviewed the medical evidence. After examining the Claimant on May 21, 2001 and reviewing Claimant's ventilatory and blood gas studies and x-ray interpretations, Dr. Rasmussen concluded that the Claimant had pneumoconiosis for which his coal mine dust exposure was the principal risk factor in causing such impairment (CX 3). Such conclusion by Dr. Rasmussen was strikingly similar to his medical report following his August 30, 2000 examination of Claimant, whereby Dr. Rasmussen diagnosed Claimant as having coal workers' pneumoconiosis arising from his coal mine employment. Furthermore, Dr. Rasmussen is a B Reader and Board Certified in Internal Medicine (CX 3). As such, I give great weight to Dr. Rasmussen's diagnosis that Claimant suffers from pneumoconiosis.

Dr. Fino submitted a medical report following his September 6, 2000 examination of the Claimant. In arriving at his conclusion that Claimant does not have coal workers' pneumoconiosis, Dr. Fino reviewed only two (2) x-rays dated March 7, 1995 and April 7, 1995 (DX-28). Furthermore, Dr. Fino's opinion is inconsistent with the full weight of x-ray evidence on record. Coal workers' pneumoconiosis is a progressive and irreversible disease, ***Stanford v. Director, OWCP,*** 7 B.L.R. 1-541 (1984); ***Tokarcik v. Consolidated Coal Co.,*** 6 B.L.R. 1-166 (1983), I can not accept Dr. Fino's medical report as a well-documented opinion since the only x-rays reviewed by him were each taken in 1995, nearly seven (7) years ago.[20] Despite being a B Reader and Board Certified in Internal Medicine and Pulmonary Disease, I give less weight to the medical report of Dr. Fino.

Without examining Claimant, Dr. Tuteur submitted a medical report following his review of twenty-seven (27) interpretations of Claimant's chest x-rays, his ventilatory studies and the medical reports of Drs. Rasmussen and Fino (EX 1). Dr. Tuteur is Board Certified in Internal Medicine and Pulmonary Disease (Id.) Despite his conclusion that Claimant's disability did not result from coal mine dust exposure, Dr. Tuteur acknowledged in his report that Claimant's chest x-rays were powerful data and therefore assumed that Claimant has a low severity of coal workers' pneumoconiosis (Id). Unlike Dr. Fino, Dr. Tuteur reviewed all, but three (3) of the Claimant's x-ray interpretations. His report is better documented and better reasoned Than Dr. Fino's on the subject of pneumoconiosis. ***Clark v.***

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[19] The Benefits Review Board has held that the clause in this section "notwithstanding a negative x-ray" must be read to mean "even if there is a negative x-ray." See ***Taylor v. Director, OWCP,*** 9-B.L.R. 1-22 BLA (1986). Thus, all physicians' reports must be considered, including those in which the physician's opinion is based in part upon a positive x-ray.

[20] See ***Clark v. Karst-Robbins Coal Co.***, 12 B.L.R. 1-149 (1989)(en banc); ***Casella v. Kaiser Steel Corp***., 9 B.L.R. 1-131 (1986). Because pneumoconiosis is a progressive and irreversible disease, it may be appropriate to accord greater weight to the most recent evidence of record especially where a significant amount of time separates the newer from the older evidence.

***Karst-Robbins Coal Co.***, 12 B.L.R. 1-149 (1989)(en banc). Moreover, his reasoning substantiates the opinion rendered by Dr.Rasmussen as to pneumoconiosis. Therefore, I give more weight to the medical report of Dr. Tuteur than Dr. Fino's.

Taking the foregoing x-ray evidence in conjunction with the medical opinions and qualifications of the respective physicians, I find that Claimant has established that he has pneumoconiosis by a preponderance of the relevant medical evidence.

**2. Etiology of Pneumoconiosis**

In order to find a Claimant eligible for benefits under the Act, it must be determined that the miner's pneumoconiosis arose at least in part out of coal mine employment. 20 C.F.R. § 718.203(a). Where a miner is credited with ten (10) or more years of coal mine employment and is suffering from pneumoconiosis, it will be presumed, in the absence of contrary evidence to the contrary, that the pneumoconiosis arose out of such employment. 20 C.F.R. § 718.203(b). If a miner who is suffering or suffered from pneumoconiosis was employed less than ten (10) years in the nation's coal mines, it shall be determined that such pneumoconiosis arose out of coal mine employment only if competent evidence establishes such a relationship. 20 C.F.R. § 718.203(c).

Since the parties have stipulated that the Claimant had fourteen (14) years of coal mine employment, he receives the presumption that his pneumoconiosis arose out of coal mine employment. And since the record does not contain contrary evidence that shows the Claimant's pneumoconiosis arose out of alternative causes, I find that Claimant's pneumoconiosis arose from his coal mine employment.

***Total Disability Due to Pneumoconiosis***

A miner is considered totally disabled when his pulmonary or respiratory condition prevents him from performing his usual coal mine work or comparable work. 20 C.F.R. § 718.204(b)(1). Section 718.204(b)(2) provides the following methods for establishing total disability: (1) qualifying pulmonary functions tests; (2) qualifying arterial blood gas studies; (3) evidence of cor pulmonale with right-sided congestive heart failure; (4) reasoned medical opinions; and (5) lay testimony.[21] Additionally, pneumoconiosis must be a "contributing cause" to the miner's total disability. ***Hobbs v. Clinchfield Coal Co.,*** 917 F.2d 790, 792 (4th Cir. 1990). Therefore, a claimant must first establish that he is totally disabled and second, that his pneumoconiosis is a contributing cause to his disability.

**1. Total Disability**

**a. Pulmonary Function Tests**

As previously stated, total disability may be established with qualifying pulmonary function studies. The quality standards for pulmonary function tests are located at 20 C.F.R. § 718.103 and require that each study be accompanied by three (3) tracings, ***Estes v. Director, OWCP,*** 7 B.L.R. 1-

[21] The Board has held that a judge cannot rely solely upon lay evidence to find total disability in a living miner's claim. ***Tedesco v. Director, OWCP,*** 18 B.L.R. 1-103 (1994).

414 (1984), and that the reported $FEV_1$ amd FVC or MVV values constitute the best efforts of three trials. Furthermore, the administrative law judge may accord lesser weight to those studies where the miner exhibited "poor" cooperation or comprehension. ***Houchin v. Old Ben Coal Co.,*** 6 B.L.R. 1-1141 (1984); ***Runco v. Director, OWCP,*** 6 B.L.R. 1-945 (1984). To be qualifying under the regulations, the $FEV_1$ and either the MVV or FVC values must be equal to or less than those values listed at Appendix B for a miner of similar age, gender and height.[22]

As provided above, Claimant underwent three pulmonary function tests since his last application for benefits was denied. However, none of these tests are qualifying under the regulations at 20 C.F.R. § 718.204 (b)(2). For each test, Claimant's $FEV_1$ did not qualify under Table B of the Regulations (DX 7, DX 28 and CX 3). 20 C.F.R. § 718, App. B. Therefore, Claimant cannot establish total disability via his pulmonary function tests.

**b. Blood Gas Studies**

Section 718.204(b)(2)(ii) provides that a claimant may prove total disability through evidence of qualifying blood gas studies. Moreover, Claimant's arterial blood gas levels must correspond to the values in Appendix C. 20 C.F.R. § 718.204(b)(2). According to Appendix C, for tests conducted at sites up to 2,999 feet above sea level, the sum of Claimant's PCO2 and PO2 levels must be equal to or less than 100 mm Hg.

Claimant underwent three (3) blood gas studies since his last application for benefits was denied. With respect to the two (2) blood gas studies performed by Dr. Rasmussen, Claimant qualifies as totally disabled, being that his values are slightly less than 100 mm Hg. However, in the study performed by Dr. Fino, Claimant's values do not qualify him as totally disabled. Because of the lapse of time between Claimant's first study (January 30, 1997) and his second (September 6, 2000) and third studies (May 21, 2001), I give very little weight to the first blood gas study performed by Dr. Rasmussen.

As for the remaining two studies, they are essentially contemporaneous in time, with similar levels. However, neither is persuasive enough to convince me to rule one way or the other in regards to total disability. As such, Claimant has failed to carry his burden of establishing total disability pursuant to blood gas study evidence.

**c. Evidence of Cor Pulmonale**

Under section 718.204(b)(2)(iii), total disability may be proven through evidence establishing cor pulmonale with right-sided congestive heart failure. This section is inapplicable to this claim because the record contains no such evidence.

**d. Physician Opinion Evidence**

Lastly, the regulations provide that a claimant may prove total disability where a physician

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[22] Based upon the record, the Claimant's height is 68.5 inches (average between the three reported heights).

exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a respiratory or pulmonary impairment prevents the miner from engaging in his usual coal mine work or comparable and gainful work. 20 C.F.R. § 718.204(b)(iv). The Claimant must first compare the exertional requirements of the claimant's usual coal mine employment with a physician's assessment of the claimant's respiratory impairment. ***Schetroma v. Director, OWCP,*** 18 B.L.R. 1-19 (1993). Once it is demonstrated that the miner is unable to perform his usual coal mine work, a *prima facie* finding for total disability is made, thereby shifting the burden to the party opposing entitlement to prove that the claimant is able to perform gainful and comparable and gainful work, as defined pursuant to 20 C.F.R. § 718.204(b)(2). ***Taylor v. Evans and Grambrel Co.,*** 12 B.L.R. 1-83, 1-87 (1988).

Claimant alleges that he has not been gainfully employed since July, 1995 (Tr. 26) and that he last worked in the coal mining industry in or around 1980 as a foreman (DX 36-31). During his time as a coal miner, Claimant held the following jobs as a coal miner: (1) miner helper, where he cut slab out from the coal; (2) shuttle car operator, where he would pull coal out from the mine on a train and (3) foreman, which required him to take a supervisory position, but still work with machines when necessary (Id.). Claimant also testified that as a coal miner, he spent all of his time underground, approximately a mile back in the mines (Tr. 11), which resulted in him inhaling coal mine dust throughout the various jobs he performed (DX 36-31). Lastly, Claimant testified that, while he was working down in the mines, he was never afforded protective devices to prevent him from inhaling the coal mine dust (Id.).

At the hearing, when asked if he Claimant testified that he would not be able to go back and do any type of underground work as he did before in the mines, Claimant testified that he would not be able to do so because his breathing is too bad (Tr. 15). Claimant further testified that "if I just walk a little bit, I get almost down" (Id.). Additionally, it was noted in Dr. Rasmussen's medical report that Claimant stated that he becomes "plumb out of breath after climbing a single flight of stairs" (CX 3). Based on the foregoing, Claimant's physical restrictions were reported as being unable to climb stairs, walk for long periods of time and becomes lightheaded upon exertion.

In comparing the exertional requirements of his last coal mining job with the physical limitations demonstrated on record, it is determined that Claimant has established that he is totally disabled pursuant to 20 C.F.R. § 718.204(b)(iv) by a preponderance of the medical evidence on record. In support, Dr. Rasmussen concluded in both of his medical reports, dated August 30, 2000 and May 21, 2001, that Claimant was totally disabled (DX 6, CX 3). Furthermore, Dr. Fino, who despite concluding that Claimant did not have coal workers' pneumoconiosis, stated in his October 5, 2000 medical report that Claimant does not retain the physiologic capacity, from a respiratory standpoint, to perform all of the requirements of his last job (DX 28). Although I do not accept Dr. Fino's conclusions as his opinion regarding the existence of pneumoconiosis is not well reasoned, this assertion, in part, substantiates Dr. Rasmusssen's opinion.

Therefore, based on the substantial evidence in the record, Claimant is totally disabled due to a respiratory impairment.

**2. Causation**

Although the weight of the evidence sufficiently demonstrates that Claimant is totally disabled, he must still establish by a preponderance of the evidence that his disability is caused by his coal workers' pneumoconiosis. That is, the claimant must prove that his pneumoconiosis is a "substantially contributing cause" to his totally respiratory or pulmonary impairment. 20 C.F.R. § 718.204(c)(1); ***Milburn Colliery Co. v. Hicks,*** 138 F.3d 524, 529 (4th Cir. 1998). To be a contributing cause, the claimant's coal mining must be a necessary condition of his disability. If the claimant would have been disabled to the same extent and by the same time in his life if he had never been a miner, then claimant has failed to meet his burden. On the other hand, if his mining has contributed to his disability, then the burden is met. ***Robinson v. Pickands Mather & Co.,*** 914 F.2d 35, 14 B.L.R. 2-68 (4th Cir. 1990).

As previously noted, Dr. Rasmussen rendered virtually identical medical reports dated August 30, 2000 and May 21, 2001 (DX 6, CX 3). In each report, Dr. Rasmussen indicated that Claimant has two risk factors for his disabling lung disease: thirty (30) years of cigarette smoking and his coal mine dust exposure (Id.). Dr. Rasmussen then concluded that Claimant's coal dust exposure is the principal risk factor behind Claimant's lung impairment due to his significantly greater gas impairment than ventilatory (Id.).

Conversely, the Employer has introduced the medical opinions of Drs. Fino and Tuteur. Both physicians opined that, while the Claimant may be totally disabled, his disability is in no way related to his coal dust exposure, but instead is a result of his smoking history (EX 1; DX 28). Despite noting that Claimant may have a low severity of coal workers' pneumoconiosis, Dr. Tuteur diagnosed Claimant's respiratory impairment as typical of emphysema as demonstrated by its severity in his CT scan of the thorax (EX 1). As for Dr. Fino, he diagnosed Claimant's condition as consistent with a smoking-elated disability and disability due to diffuse pulmonary fibrosis (DX 28).

Clinical pneumoconiosis refers to the lung disease caused by fibrotic reaction of the lung tissue to inhaled dust, which is generally visible on chest x-rays as opacities. ***Usery v. Turner-Elkhorn Mining Co.,*** 428 U.S. 1, 7, 96 S.Ct. 2882, 2888-89, 49 L.Ed.2d 752 (1976). Legal pneumoconiosis refers to all lung diseases which meet the statutory or regulatory definition of being any lung disease which is significantly related to, or substantially aggravated by, dust exposure in coal mine employment. 20 C.F.R. § 718.201; ***Hobbs v. Clinchfield Coal Co.,*** 917 F.2d 790, 792 (4th Cir. 1990).

The Act provides benefits for any chronic lung disease significantly related to, or substantially aggravated by, dust exposure in coal mine employment. Moreover, contrary to strict clinical usage, the Act defines any such pulmonary disease as 'pneumoconiosis.' In evaluating the opinions of physicians, ALJs and the BRB must bear in mind that medical professionals generally use medical terms of art, not legal ones. ***Compton v. Beth Energy Mines, Inc.,*** 1998-B.L.A.-14 (1998)(citing ***Roberts v. West Virginia C.W.P. Fund,*** 20 B.L.R. 2-69 (4th Cir. 1996). To physicians, 'pneumoconiosis' is a single disease, arising in whole from a specific cause (dust exposure), and producing a characteristic form of pulmonary damage. ***Id.*** To the law, 'pneumoconiosis' is an array of diseases, arising in whole or in part from dust exposure, and the form of pulmonary damage is irrelevant, so long as some impairment arises from it. ***Id.***

The Fourth Circuit Court of Appeals requires that pneumoconiosis be "a" 'contributing cause'

to the claimant's total disability. ***Toler v. Eastern Associated Co.,*** 43 F.3d 109, 112 (4th Cir. 1995); ***Jewel Smokeless Coal Corp. v. Street,*** 42 F.3d 241, 243 (4th Cir. 1994). Additionally, the Board requires that pneumoconiosis be a 'contributing cause' of the miner's disability. ***Scott v. Mason Coal Co.,*** 14 B.L.R. 1-37 (1990)(en banc), overruling ***Wilburn v. Director, OWCP,*** 11 B.L.R. 1-135 (1988). In ***Street,*** the Court emphasized the steps by which the cause of total disability may be determined by directing the Administrative Law Judge to determine whether the claimant suffers from respiratory or pulmonary impairment that is totally disabling and whether the claimant's pneumoconiosis contributes to his disability. ***Street,*** 42 F.3d 241 at 245.

To qualify for benefits, the claimant need not prove that pneumoconiosis is the 'sole' or 'direct' cause of his respiratory disability, but rather that it has contributed to his disability. ***Robinson v. Pickands Mather & Co./Leslie Coal Co. & Director, OWCP,*** 914 F.2d 35, 14 B.L.R. 2-68 (CA4 1990) at 2-76. There is evidence on record that Claimant's respiratory disability is due, in part, to his undisputed history of cigarette smoking. However, Dr. Rasmussen examined the Claimant on two (2) occasions and each time found him totally disabled due to a combination of cigarette smoking and coal mine dust exposure (DX 6, CX 3). Dr. Rasmussen explained that while both smoking and CWP could cause Claimant's impairment, CWP is the principal risk factor to Claimant's disability (Id.).

The Employer's experts are adamant that Claimant's disability does not arise from CWP or emphysema caused by coal dust exposure, and have further ruled out that Claimant's lung impairment is significantly related to dust exposure in coal mine employment (EX 1, DX 28). In comparing the qualifications of the three (3) physicians, I hold that they are equally qualified to render a credible diagnosis of the Claimant. All three (3) are Board Certified in Internal Medicine (CX 3, EX 2, DX 28). Drs. Fino and Tuteur are also Board Certified in Pulmonary Disease, whereas Dr. Rasmussen is Board Certified in Forensic Medicine (Id.). Lastly, each are well-published and have gained numerous achievements in their respective fields (Id.). Being that the qualifications of the three (3) physicians are of equal weight, I must evaluate the conflicting medical reports and accord proper weight.

Drs. Fino, who failed to diagnose Claimant as having coal workers' pneumoconiosis, attributed his chronic obstructive pulmonary disease (COPD) to his smoking (DX 28). As stated before, Dr. Fino failed to review any of Claimant's chest x-rays over the past few years before rendering his medical opinion (DX 28). Additionally, Dr. Fino also failed to take into account the fact that pneumoconiosis can be "a" 'contributing cause' of Claimant's total disability. Furthermore, where an Administrative Law Judge determines that a miner suffers from pneumoconiosis, a medical opinion finding the miner does not suffer from the disease can carry little weight in assessing the etiology of the miner's total disability. ***Toler v. Eastern Associated Coal Co.,*** 43 F.3d 109, 116 (4th Cir. 1995). Therefore, Dr. Fino's medical opinion is inconsistent with the full weight of all the evidence on record. It is for these reasons that I give very little weight to Dr. Fino's medical report.

On the other hand, Dr. Rasmussen reviewed Claimant's medical background in its entirety before rendering his medical opinion. And unlike Dr. Fino, Dr. Rasmussen took both Claimant's cigarette smoking history and his coal mine dust exposure into account before concluding that Claimant's coal mine dust exposure is the principal risk factor in his disability (DX 6, CX 3). As such, Dr. Rasmussen's medical opinion is more rational than Dr. Fino's because it is based on the totality of the circumstances.

By offering Dr. Rasmussen's medical opinion whereby Claimant's coal mine dust exposure is the principal risk factor in his disability, the Claimant has met his burden of establishing that his pneumoconiosis is a "substantially contributing cause" to his totally respiratory or pulmonary impairment. Therefore, the burden is now on the Employer to try to refute Dr. Rasmussen's medical report as to the etiology of Claimant's total disability. Having already established that Dr. Fino's medical opinion is of little weight, the Employer must do so with the medical report of Dr. Tuteur.

Dr. Tuteur, who did not examine the Claimant, acknowledged his positive chest x-rays as powerful data and assumed for his report that Claimant, in fact, has a low severity of coal workers' pneumoconiosis (CWP) (EX 1). Despite noting that Claimant has a low severity and profusion of CWP, Dr. Tuteur, in his report, states that Claimant clearly does not have sufficient severity and profusion to produce impairment of pulmonary function – no restrictive abnormality – to produce clinical symptomatology (EX 1). Dr. Tuteur later states that Claimant does have respiratory impairment; one which is characterized by a mild obstructive abnormality and is typical of emphysema, a cigarette smoke induced pulmonary problem (Id.). Dr. Tuteur concludes that this respiratory impairment is not related to, aggravated by or caused by the inhalation of coal mine dust or the development of coal workers' pneumoconiosis, which is fully explained by emphysema as demonstrated on the CT scan of the thorax, and furthermore, none of Claimant's respiratory or pulmonary impairment is due, in whole or in part, to CWP or coal mine dust exposure (Id.).

Essentially, the Employer, through the medical report of Dr. Tuteur, is offering emphysema as an affirmative defense to the etiology of Claimant's total disability.[23] However, Dr. Tuteur fails to acknowledge the fact that emphysema, specifically focal emphysema, can be associated with coal dust exposure.[24] ***Compton v. Beth Energy Mines, Inc. and Director, OWCP,*** 98 B.L.A. 14 (1998)(citing Dorland's Illustrated Medical Dictionary). Thus, Dr. Tuteur fails to offer any rationale as to why Claimant's emphysema is not related to his coal mine dust exposure. As such, Employer's medical evidence (Dr. Tuteur's medical report) does not disprove Dr. Rasmussen's finding that Claimant's coal mine dust exposure was at least "a" 'contributing cause' to his total disability. Although a non-examining physician's medical opinion can constitute substantial evidence, it can be a factor to be considered in the weighing of medical evidence. ***Worthington v. United States Steel Corp.***, 7 BLR 1-522 (1984), ***Collins v. J & L Steel (LTV Steel)***, 21 B.L.R. 1-182 (1999).[25]

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[23] In his medical report, Dr. Tuteur stated that the cause of the Claimant's expiratory impairment is cigarette smoke induced chronic obstructive pulmonary disease with predominant emphysema (EX 1).

[24] There is no disagreement that focal emphysema arises from coal mine dust exposure. ***Rice v. Consolidated Coal Company and Director, OWCP,*** 99 B.L.A. 465 (1999).

[25] The Fourth Circuit has stated that while medical opinions of non- examining physicians have diminished probative value, an administrative law judge may, in some instances, give them some weight. ***Vogel v. Consolidation Coal Co.***, No. 85-1718 (4th Cir. Feb. 27, 1986)(unpub.).

Therefore, I find it more likely than not that Claimant's disability, whether coal workers' pneumoconiosis or emphysema, is significantly related to his coal mine dust exposure.

In support, the Fourth Circuit has held that the form of pulmonary damage is irrelevant so long as some impairment arises from it and that the claimant must prove that pneumoconiosis contributed to the total disability. ***Roberts v. West Virginia C.W.P. Fund,*** 20 B.L.R. 2-69 (4th Cir. 1996); ***Toler v. Eastern Associated Coal Co.,*** 43 F.3d 109, 116 (4th Cir. 1995). Furthermore, the Fourth Circuit appears to make no distinction concerning the degree of contribution; nor does the Benefits Review Board. ***Compton v. Beth Energy Mines, Inc.,*** 1998-B.L.A.-14 (1998). Thus, on this basis alone, I could find this element of entitlement established.

Paraphrasing the Court's language in ***Robinson,*** supra, I find Claimant would not have been disabled to the same degree and by the same time in his life if he had never been a coal miner. I find the Claimant has met his burden of proof in establishing the existence of total disability due to legal coal miners' pneumoconiosis. ***Director, OWCP v. Greenwich Collieries,*** 512 U.S. 267, 114 S.Ct. 2251, 129 L.Ed.2d 221 (1994). Therefore I find that Mr. Dye became totally disabled due to pneumoconiosis on June 1, 2000. 33 U.S.C. §§ 906(a).

## ORDER

**IT IS ORDERED** that the claim for benefits filed by Ralph D. Dye is **granted.** The Employer, **Farwest Coal Company** shall:

1. Pay to the Claimant, all benefits to which he is entitled, including augmented benefits to his dependent wife, Evelyn Wallace Dye, under the Black Lung Benefits Act, commencing as of June 1, 2000, the month in which the Miner became entitled (33 U.S.C. §§ 906(a));
2. Pay to the Secretary of Labor reimbursement for any payment the Secretary has made to Ralph D. Dye under the Act, and to deduct such amounts, as appropriate, from the amount the Employer is ordered to pay under paragraph 1 above;
3. Pay to the Secretary of Labor interest as provided by law under Section 6621 of the Internal Revenue Code of 1954. Interest is to accrue thirty (30) days from the date of the initial determination of entitlement to benefits. 20 C.F.R. §§ 725.608.
4. Claimant's attorney is granted thirty (30) days to submit an application for fees conforming to the requirements of 20 C.F.R. §§ 725.365 and §§ 725.366.

**SO ORDERED**.

A
Daniel F. Solomon
Administrative Law Judge

**Notice of Appeal Rights:** Pursuant to 20 C.F.R. §725.481, any party dissatisfied with this Decision

and Order may appeal it to the Benefits Review Board within 30 days from the date this decision if filed with the District Director, Office of Worker's Compensation Programs, by filing a notice of appeal with the Benefits Review Board, ATTN: Clerk of the Board, Post Office Box 37601, Washington, DC 20013-7601. See 20 C.F.R. §725.478 and §725.479. A copy of a notice of appeal must also be served on Donald S. Shire, Esquire, Associate Solicitor for Black Lung Benefits. His address is Frances Perkins Building, Room N-2605, 200 Constitution Avenue, NW, Washington, DC 20210.